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Supreme Court of the United States

OCTOBER TERM, 1947

No. 277

ARNOLD BERNSTEIN, also known as ARNOLD M. BERNSTEIN,
Petitioner,

against

VAN HEYGHEN FRERES SOCIETE ANONYME.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF AMERICAN JEWISH CONGRESS, AS AMICUS CURIAE, IN SUPPORT OF PETITION

Preliminary Statement

The American Jewish Congress, which submits this brief, is a membership corporation chartered under the laws of the State of New York "to safeguard the civil, political, economic and religious rights of the Jews in all countries" and "to secure effective remedies, assistance and redress in all cases of injustice, hardship or suffering arising out of discriminatory measures or practices against Jews, or from the violation or denial of their lawful rights."

The Jewish minority suffered more grievously than any other group from Nazi fury. Its members became the target of ferocious attack solely by reason of their faith and origin. Its survivors and heirs are foremost among

those having rightful claims for redress—to the very limited extent that redress remains possible at all.

The American Jewish Congress is therefore impelled to oppose a precedent which would close the doors of our courts to all victims of Nazi brutality and rapacity in the Third Reich,—a precedent which, we believe, conflicts with decisions of this Court and misinterprets national policies in the field of foreign affairs.

The stake involved in this narrow aspect of the decision below is more than mere convenience in the enforcement of private rights. Restrictions upon the transfer of funds render a judgment recovered in almost any European country worthless to a plaintiff who resides here. In this situation only American courts can give effective relief to our residents.

The American Jewish Congress is further concerned about the broad and disastrous implications of the decision below upon the process of restitution to the victims of Nazi persecution abroad. The American government, by suggesting enactments in liberated countries and through military government regulations, armistices and peace treaties in enemy territory, has brought about most of the results so far achieved in the return of looted property to victims of Nazi oppression. Its influence would be seriously undermined by what Judge Clark, in his dissent below, described as the mystifying effect upon our allies as well as our enemies of "the vagaries of a policy looking to restitution to the Jews in Germany at the same time that it accepts the acts of Nazi oppression of the Jews as binding in American courts" (R. 76).

That would be so if the decision relied on juridical theorems only, for even in that event it would be understood abroad as a symptom of American indifference to the problem. But the decision is actually based upon an interpretation of national policies in foreign affairs. The majority below seems to impute to the executive a desire to remain free to trade, in some future diplomatic bargain, an abandonment of its present position in favor of restitu-

tion, and therefore an unwillingness to accept even the slight impairment of its freedom of action in this respect which could result from judicial determinations in isolated cases. Coming at the very time when the same issue with respect to disposition of Nazi loot in Austria faces representatives of our government in grave diplomatic negotiations, this proclamation of a policy of expediency and skepticism threatens to impede, if not wreck, the constructive work in which the political department is actually engaged.

It is for these reasons that the American Jewish Congress joins the petitioner in urging that this Court grant review of the decision below.

The Issues Presented

The decision below must stand or fall on the *federal* ground on which it was placed; namely, that the matter is not one for judicial cognizance.

The Court of Appeals made clear that plaintiff's defeat is not due to any difficulty arising under local law. Indeed, it recognized that the sordid transaction revealed by this record is "utterly odious to the accepted standards of justice" prevailing in New York (R. 66).

The Court of Appeals also accepted the thesis, which we had expounded in an *amicus curiae* brief below, that the specific instance of looting involved in the instant case was tortious according to the Nazi regime's own "law" and would be presently remediable in a German court if jurisdiction in that country could be obtained (R. 65).[1]

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[1] We have since obtained further material, in particular a decision of the Kammergericht, Prussia's highest appellate court, of October 29, 1946, reported in (1947) 2 Süddeutsche Juristen-Zeitung 257, which affords conclusive proof of this contention. We refrain on this petition from burdening the Court with an exposition of foreign law and with the foundation as to judicial notice which that might require; but we hope, if and when this Court considers the merits of the case, to be allowed to assist it with pertinent information of this nature.

This thesis perhaps does not need to be proved at all at the present stage. The result reached below requires a certainty "that the plaintiff must ultimately fail" (R. 64). If the decision depends upon foreign law, a mere possibility that such law might support plaintiff's position would be sufficient.

Plaintiff, therefore, has a completely valid case under local and foreign law, at least for present purposes, unless recovery is conclusively barred by the "act of state" doctrine. The applicability of that doctrine here depends on the validity of each of four propositions adopted by the court below:

(1) that plaintiff's attachment papers present the transaction complained of as a *governmental* act (R. 64-65);

(2) that purported official action of a foreign government which derives no effect from the foreign country's own *municipal* law is nevertheless conclusive upon our courts (R. 65);

(3) that the outrages alleged in this record, if attributable to the defunct Nazi government as such, must be treated with the respect which may be due to sovereign measures of a traditional type taken by a friendly nation (R. 71-72); and

(4) that the policy of redress for Nazi crimes so far pursued by our executive—including the hanging of the master criminals—is not outspoken enough to compel adherence by the judiciary (R. 65-70).

ARGUMENT

I

Whether or not the "act of state" doctrine is applicable at all to acts of the defunct Nazi government, it should not be broadened so as to extend to unofficial acts of members of the Nazi party.

It is common knowledge that the Nazi regime hesitated until after its diplomatic triumph at Munich in 1938 to take any official steps against Jewish property.[2] Prior "aryanizations", the work of underlings of the Nazi party acting in pursuit of personal greed, for their private profit and not in any official capacity, may have been rendered possible by the benevolent toleration of a violently anti-semitic government. But at that time the Hitler government did not yet dare to identify itself with the looting, refused to take any part of the spoils, and continued to pay lip service to the civilized property laws of the Weimar republic which were still on the books.

True, threats of abuse of official power were usually the instrument of depredation. But the spoliations served private rapacity only and were accomplished by naked extortion without any pretense of pseudo-legality or of governmental sanction. They culminated in the coerced execution by the victims of ordinary documents of transfer to private beneficiaries. The *legal* structure of these early transactions has nothing in common with the confiscations by administrative decree which were to follow after 1938.

The exact date of the plundering is not specified in the record and remains a triable issue. Contemporaneous newspaper accounts, however, reveal that the *affaire* Bern-

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[2] The confiscation of Jewish property was initiated by the Order Eliminating Jews from German Economic Life, of November 12, 1938, (1938) 1 Reichsgesetzblatt 1580, translated in 4 *Office of United States Chief of Counsel for Prosecution of Axis Criminality, Nazi Conspiracy and Aggression* 172.

stein occurred during the earlier period and followed the earlier pattern.[3]

The realities of the situation are therefore utterly inconsistent with the interpretation placed below upon the attachment papers.

This is not merely a question of construction of pleadings. That the mere words "Nazi officials"—which come close to carrying a presumption of criminal guilt under the Nuernberg verdict—should be given the magic effect of precluding our courts from questioning whether acts perpetrated by persons thus referred to were of a private or governmental nature would be utterly intolerable. If the "act of state" doctrine of the Second Circuit is not to be discarded altogether, or at least in this context, it should in any event be circumscribed and administered with restraint. Contrast the disposition of this case on affidavits by the court below with the painstaking analysis of extensive testimony by the Court of Appeal in *Princess Paley Olga* v. *Weisz,* [1929] 1 K. B. 718, 726-728, in determining whether the contents of the Princess' palace in Russia had been seized under the authority of the Soviet government rather than pillaged by common robbers.

On this record the court below was not compelled to set a disturbing precedent and to assume responsibility for interpretation of national policies. The "act of state" issue would probably disappear if the case were sent to trial.

II

The Second Circuit rule against "review" under foreign municipal law of defective foreign "acts of state" contradicts the practice of this Court and should be repudiated.

This Court has repeatedly held that the courts of this country owe to the official acts of a foreign government

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[3] See cable dated Hamburg in The New York Times, January 4, 1938, under the headline: "Bernstein gives up his shipping stock."

the same respect which they enjoy at home. Thus it has decided that such acts may not be attacked here on the ground that they violate international treaties (*Oetjen* v. *Central Leather Co.*, 246 U. S. 297 (1918)); the laws of an earlier regime (*Underhill* v. *Hernandez*, 168 U. S. 250 (1897); *Ricaud* v. *American Metal Co.*, 246 U. S. 304 (1918)),[4] or the forum's statutory law or "public policy" (*American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347 (1909); *United States* v. *Pink*, 315 U. S. 202 (1942)). Where, however, an "act of state" has been challenged on the ground that it violated the municipal law of the foreign country itself, this Court has never hesitated to resolve that issue. *Canada Southern Ry.* v. *Gebhard*, 109 U. S. 527 (1883); *Carrington* v. *The Merchant Ins. Co.*, 8 Pet. 495 (1834); *Church* v. *Hubbart*, 2 Cranch. 187 (1804).

Nevertheless, the court below held that the rule of the *Oetjen* and other cases cited above requires that our courts give conclusive effect even to "acts of state" which are utterly void and open to collateral attack when and where committed. In doing so the court relied for controlling precedent solely on decisions reached in that Circuit and said, "if we have been mistaken, the Supreme Court must correct it" (R. 65).

For a court to find fault with a manifestation of foreign sovereign power requires, of course, tact and caution. Yet just that is done regularly today with respect to "acts of state" of an extra-territorial nature and with respect to judgments. No reason appears why it should be forbidden

[4] These two cases arose from successful revolutions which were followed by our diplomatic recognition of the insurgent party. The question was whether action taken by the rebel body prior to its recognition should be tested by the old legal order against which it offended or by the new standards from which it derived sanction. It was held that recognition "validates" prior acts of the new government.

by a rigid rule in the case of those local acts of a foreign government which are repudiated by its own laws.[5]

We submit that the rule announced by the court below conflicts with the *Canada, Carrington* and *Church* cases, *supra,* and, in any case, represents a substantial and novel extension of the rule of the *Underhill* and following cases which raises an issue of general importance which has not been, and should be, decided by this Court. The Second Circuit rule stems from an obsolete concept of sovereign dignity and narrow territorialism. Unless it is abolished, American business will be at a serious disadvantage in its transactions with other countries at a time when government intervention in commercial affairs is the rule rather than the exception abroad.

III

The reasons underlying the "act of state" doctrine as developed by this Court do not permit its application to acts of the defunct Nazi government.

The *Oetjen* case [6] is based on the ground that judicial disapproval of foreign sovereign acts might result in undesirable international friction. That danger exists only if the government whose act is to be disapproved is still in existence. For our courts to "sit in judgment" on the acts of the Nazi regime, which has been destroyed and its leaders hanged, cannot possibly "imperil friendly relations between nations".

Again, judges may find it embarrassing to resolve controversial issues as to the merits of administrative or

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[5] For a modern British view and a complete analysis of this problem, see *Mann, The Sacrosanctity of the Foreign Act of State,* (1943) 59 L. Q. Rev. 42; and *cf. Sack, War Criminals and the Defense of Act of State in International Law* (1945) 5 Lawyers Guild Rev. 288.

[6] *Oetjen* v. *Central Leather Co., supra.*

political measures taken by a civilized foreign nation. No such problem exists here. The merits of the barbarous campaign of annihilation waged by the Hitler regime against a helpless minority are not controversial. History has passed its judgment, and to conform with that judgment is not a delicate task.

Since November, 1938—long prior to the purchase of plaintiff's vessel by the defendant—and up to the outbreak of the war, a United States Government conscious of its moral responsibilities, in protest against wanton excesses inflicted upon the Jewish minority in Germany, left our representation in Berlin in the hands of a chargé d'affaires [7] and thus deliberately brought on just that friction which the *Oetjen* case and its successors enjoin the judiciary to avoid. In the words of Judge Clark's dissent below: "Those precedents do not deal with, or even appear to visualize, the situation where our Executive acts later to repudiate the recognition which it has granted and to declare the acts of that nation as wrongful and void, to be wiped out by a tremendous war effort and by acts of restitution and retribution at the war's end" (R. 73).

Plaintiff is entitled to relief by all possible standards of justice and decency if he can prove that defendant was actually a knowing beneficiary of the crude extortion alleged in the complaint. Only the "act of state" doctrine stands in the way. The reasons for that doctrine are clearly inapplicable in this instance. Legal symmetry certainly does not require our courts to treat the loathsome activities of Nazi gangsters as the sovereign action, within established patterns of civilized government activity, of a foreign nation in good standing.

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[7] The reasons for the recall of our Ambassador are to be found in "Statement on Racial Persecution of German Government," The Five Hundredth Press Conference, November 15, 1938, *The Public Papers and Addresses of Franklin D. Roosevelt,* 1938 Volume, 596-597.

IV

The decision below fails to give due effect to a well-defined policy of the political department in the field of foreign affairs and therefore violates a principle firmly established by this Court.

The position of the executive is clearly summarized in paragraph 17(d) of the recent Directive Regarding the Military Government of Germany, of July 11, 1947, State Department Release No. 582:

> It is the policy of your Government that persons and organizations deprived of their property as a result of National Socialist persecution should * * * have their property returned * * *.

A more explicit pronouncement can hardly be imagined.

The majority below nevertheless believed that the executive is unwilling to have this policy acted upon by our courts. But unequivocal expressions of policy in the field of foreign relations have always been considered as conclusive without a further specific request by the political department that the courts fall in line. *United States* v. *Pink, supra.*

The very question whether the absence of such a specific request by the executive leaves the courts free to take a position antagonistic to the diplomatic practice of the nation was set at rest by *Mexico* v. *Hoffman,* 324 U. S. 30 (1945).

Nor is any more explicit enunciation of policy required to overcome whatever binding effect a foreign "act of state" might otherwise have. That was settled as far back as *Williams* v. *The Suffolk Ins. Co.,* 13 Pet. 415 (1839).

These decisions have been by-passed on the ground that judicial enforcement of the national policy would in this instance be "destructive of the underlying necessities of a treaty of peace" (R. 70). But Judge Learned Hand's

opinion concedes that the relationship between this American plaintiff and this Belgian defendant would not even properly be the subject of disposition in a treaty to be signed with Germany; it ultimately considers only a possible tenuous claim over, which the Belgian Government might assert against Germany on behalf of defendant (R. 69-70).

Yet, defendant did not deal with the Nazi government; it purchased the vessel from a commercial corporation (R. 26). The transactions challenged by the complaint occurred before the outbreak of hostilities and were not acts of foreign war. If the hypothetical claim of Belgium nevertheless had merits, it would not necessarily "have to be adjudicated as an item of the general claim for reparations against Germany," as Judge Hand assumed (R. 70). The peace treaties with Italy and Bulgaria do not mention at all the problem of restitution to victims of religious, racial or political persecution, because these countries had made satisfactory arrangements during the armistice. The treaties with Rumania and Hungary [8] merely compel continuation of our policy by the defeated nations. There are thus four precedents to the effect that such claims may well "be left to the decision of * * * other tribunals than those to which the ascertainment of reparations will be left" (R. 70).

The executive should best know its business. In its opinion restitution at this time is not premature and will not complicate the task of peace-making. Under the Directive it would be the duty of the Commander-in-Chief of our Occupation Forces to bring about a return to plaintiff if the vessel had not been sunk and were presently located in a German port. That return would have the very same effect upon the future peace treaty as the judgment demanded in this action.

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[8] Department of State Publication No. 2743, European Series 21; Rumania, Article 25; Hungary, Article 27.

CONCLUSION

The decision below is in undeniable conflict with this Court's repeated holdings that the judiciary must conform with executive policies in international affairs.

It also departs from the practice of this Court which until now has been to examine freely whether a foreign governmental act complies with the applicable foreign law. There are further presented two important problems relating to the scope of the "act of state" doctrine: whether it can possibly be extended to acts of Nazi oppression; and, if so, whether the mere participation in a transaction of persons referred to as "Nazi officials", without more, should put the rule in operation.

We respectfully submit that these legal considerations are ample to justify review. The international ramifications of the problem, however, call perhaps still more urgently for an exercise of this Court's power of supervision. The interpretation of national policies imposes a grave responsibility upon courts. The exact significance of a denial of certiorari is not understood abroad and such a disposition would certainly be claimed to indicate approval. No pronouncement of a lower court on such a matter should be allowed to remain the final word.

The petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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October 1947.